EVERGRADE INDUSTRIES SDN BHD

v.

AFFIN BANK BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: MT2-22-221-2002]
7 OCTOBER 2005

CIVIL PROCEDURE: *Parties - Joinder of parties - Joinder under O. 15 r. 4(1)(a) and (b) Rules of the High Court 1980 - Whether O. 15 r. 4(1)(a) and (b) allow a joinder as of right - Joinder under O. 15 r. 4(2) - Joinder under O. 15 r. 6(2)(b)(i) or (ii) - Conditions which must be fulfilled for court to exercise discretion to order a joinder under O. 15 r. 6(2)(b)(i), (ii)*

CONTRACT: *Privity of contract - Whether guarantors are privy to debenture*

The applicants applied by way of summons in chambers seeking an order that they be made plaintiffs 3, 4, 5 and 6, under O. 15 rr. 4 and 6 of the Rules of the High Court 1980. The applicants were the guarantors to the banking facilities which had been extended by the first defendant to plaintiffs. In this action, plaintiffs 1 and 2 were claiming against the defendants for an order, *inter alia*, that the appointment of the second and third defendants as the receivers and managers of plaintiffs 1 and 2 was void, and for damages to be assessed. Plaintiffs 1 and 2 had since been wound up.

The applicants' grounds were, *inter alia*, that the facts and issues in Melaka High Court GS MT1-22-64-03 and MT2-22-65-03 ("the other two suits") commenced by the first defendant against the applicants were the same as those in the instant action; and that all matters in dispute here may be effectually and completely determined and adjudicated upon. In the other two suits, the first defendant claimed against plaintiffs 1 and 2 as well as the applicants for recovery of all sums of money allegedly due under the banking facilities which were said to arise out of the same transactions in this action. The applicants intended to proceed with this action against the defendants on the ground that the first defendant had allegedly terminated the banking facilities prematurely and wrongfully, and that the applicants must necessarily be added as plaintiffs 3, 4, 5 and 6, so that all issues and facts may be determined in one proceeding.

It was submitted for the first defendant that: (i) upon the winding-up of the plaintiffs, the right of action rests with the provisional liquidators, not the directors or guarantors, relying on s. 236(2)(a) of the Companies Act 1965; (ii) the applicants who were not parties to the debenture and there was no privity of contract between them and the first defendant so as to give them the *locus standi*; and (iii) the applicants had already counterclaimed against the first defendant in the other two suits, and making them additional plaintiffs would result in duplicity of actions. For the plaintiffs, it was contended that the applicants' case was not to substitute the plaintiffs herein but to be made as additional plaintiffs. The issue for determination was whether the applicants had fulfilled the conditions under O. 15 r. 6(2)(b)(i) or (ii) in order to enable the court to exercise the discretion so as to order them to be added as parties *viz* as additional plaintiffs in this case.

Held, allowing the application:

[1] Order 15 r. 4(1)(a) and (b) would apply to the situation in which separate actions are brought by or against each of the plaintiffs. Upon fulfilment of the conditions in paras (a) and (b), there will be a joinder as of right, while in all other cases, joinder may be with leave of the court. Similarly, O. 15 r. 4(2) would apply to bring about a joinder where the plaintiff claims any relief to which any other person is entitled jointly with him. However, the factual background of the present case did not come within the ambit of O. 15 r. 4(1)(a) and (b), or O. 15 r. 4(2), as the applicants herein were not the plaintiffs in the other two suits. The applicants were actually the defendants there, and were sued by the plaintiff there *ie*, the first defendant herein. (p 831 f-h)

[2] The test to be applied in deciding whether a person is entitled to be added as a party under O. 15 r. 6(2)(b)(ii) is as laid down in *Arab Malaysian Merchant Bank Bhd v. Dr. Jamaludin Dato' Mohd Jarjis*. The factual background in the present case had fulfilled the test and governing principles set out in *Arab Malaysian Merchant Bank Bhd. (supra)*. (pp 833 b & 834 b)

[3] The applicants did not intend to replace the existing plaintiffs. The applicants only sought to be made additional plaintiffs. There is nothing in s. 236(2)(a) of the Companies Act 1965 to preclude the applicants from being made additional plaintiffs. (p 835 d & f)

[4] The applicants had taken the capacity of guarantors in which case they were clearly persons to whom privity of contract would apply. (p 836 c)

[5] On the issue of duplicity of action, the applicants had a right or cause of action as the applicants had filed this application *qua* guarantor. (p 836 f)

Case(s) referred to:

Abdul Manaf Mohd Ghows v. Nusantara Timur Sdn Bhd & Ors [1997] 4 CLJ 437 CA ***(refd)***

Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis [1991] 2 CLJ (Rep) 862; [1991] 1 CLJ (Rep) 19 SC ***(refd)***

Bank of Canton Ltd v. Dart Sum Timber Pte Ltd [1978] 2 MLJ 5 ***(refd)***

Bank of Ethiopia v. National Bank of Egypt and Liguori [1937] 3 All ER 8 ***(refd)***

Burgess v. Auger [1998] 2 BCLC 478 ***(refd)***

Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd [2000] 7 CLJ 550 HC ***(refd)***

Fargro Ltd v. Godfroy & Ors [1986] 3 All ER 279 ***(refd)***

Foo Ban Nyen v Foo Yet Kai & Sons Sdn Bhd & Ors [1991] 2 CLJ 1364; [1991] 2 CLJ (Rep) 612 HC ***(refd)***

Gurtner v. Circuit [1968] 1 All ER 328 ***(refd)***

Inai Etike Sdn Bhd v. Mohd Fadzil Wadi & Ors [1995] 4 MLJ 731 HC ***(refd)***

Kejutan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors [2005] 2 CLJ 766 HC ***(refd)***

Kent & Ors, Liquidators of LA Banque Ville-Marie v. LA Communayte Des Sceurs De Charite De La Providence & Ors [1930] AC 220 ***(refd)***

Lai Kim Loi v. Dato' Lai Fook Kim & Anor [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***

Malayan Prestressed Concrete Strand Manufacuring Sdn Bhd (Dalam Penerimaan) & Satu Yang Lain v. Malaysian Ropes Sdn Bhd [1991] 3 CLJ 2096; [1991] 1 CLJ (Rep) 686 HC ***(refd)***

Scarel Pty Ltd v. City Loan & Credit Corporation Pty Ltd [1987] 12 ACLR 730 ***(refd)***

Sin Heap Lee – Marubeni Sdn Bhd v. Yip Shou Shan [2004] 4 MLJ 35 CA ***(refd)***

Thomas Alvin Cross v. Thomson Thomas & Ors [2005] 6 CLJ 61 HC ***(refd)***

Yip Shou Shan v. Sin Heap Lee – Marubeni Sdn Bhd [2002] 5 CLJ 574 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 181, 218, 236(2)(a)

Rules of the High Court 1980, O. 15 rr. 4(1)(a), (b), (2), 6(2)(b)(i), (ii), O. 18 r. 19

Other source(s) referred to:

Malaysian High Court Practice MLJ, 1998 Desk Edn 1, pp 336-340, para 15.4.1.

For the plaintiffs - KL Wong; M/s KL Wong

For the 1st defendant - Kee Tiong Kiak; M/s Chee Siah Le Kee & Partners

For the 2nd & 3rd defendants - Tharminder Singh (Sylvia Cotter with him); M/s Logan Sabapathy & Co

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

Application

This is an application by way of summons in chambers in encl. (72) filed by the applicants seeking an order that they be made plaintiffs 3, 4, 5 and 6, under O. 15 rr. 4 and 6 of the Rules of the High Court 1980, with costs in the cause.

A reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980.

The applicants' grounds are, *inter alia*, that the facts and issues in Melaka High Court GS MT1-22-64-03 and MT2-22-65-03 ("the other two suits") commenced by the first defendant against the applicants are the same as those in the instant action; and that all matters in dispute here may be effectually and completely determined and adjudicated upon.

Factual Background

The affidavit in support was affirmed by one Lau Boon Wong who was also authorised by the other applicants to affirm it on their behalves.

The applicants are the guarantors to the banking facilities which had been extended by the first defendant to plaintiffs 1 and 2.

In the other two suits, the first defendant claimed against plaintiffs 1 and 2 as well as the applicants for recovery of all sums of money allegedly due under the banking facilities which were said to arise out of the same transactions in this action.

The applicants intend to proceed with this action against the defendants herein on the ground that the first defendant had allegedly terminated the banking facilities prematurely and wrongfully, and that the applicants must necessarily be added as plaintiffs 3, 4, 5 and 6, so that all issues and facts may be determined in one proceeding.

In this action, plaintiffs 1 and 2 are claiming against the defendants for an order, *inter alia*, that the appointment of the second and third defendants as the receivers and managers of plaintiffs 1 and 2 are void, and for damages to be assessed.

Plaintiffs 1 and 2 have since been wound up.

Order 15 r. 4

In contending that this application should be allowed, learned counsel Mr KL Wong relied on O. 15 r. 4.

First defendant's learned counsel Mr. Kee Tiong Kiak does not appear to touch on the applicability of O. 15 r. 4.

Mr. Tharminder Singh and Miss Sylvia Cotter, learned counsel for second and third defendants, submitted that the applicants' reliance on O. 15 r. 4 is misconceived.

At this stage, it is appropriate for me to refer to the relevant portions of O. 15 r. 4:

> **4. Joinder of parties (O. 15 r. 4)**
>
> (1) Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs …
>
> (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
>
> (b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.
>
> (2) Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any written law and unless the Court gives leave to the contrary, be parties to the action …

Upon a proper construction of O. 15 r. 4(1)(a) and (b), I am of the view that these provisions would apply to the situation in which separate actions were brought by or against each of the plaintiffs. Upon fulfilment of the conditions in paras (a) and (b), they will be a joinder as of right, while in all other cases, joinder may be with leave of the court: *Malaysian High Court Practice MLJ 1998*, Desk Edn 1, pp. 336-340, para 15.4.1.

Similarly, O. 15 r. 4(2) would apply to bring about a joinder where the plaintiff claims any relief to which any other person is entitled jointly with him.

However, the factual background before me does not appear to come within the ambit of the above relevant portions of O. 15 r. 4(1)(a) and (b), or O. 15 r. 4(2), as the applicants herein were not the plaintiffs in the other two suits. The applicants were actually the defendants there, and were sued by the plaintiff there ie, the first defendant herein.

In the circumstances, I am of the view that O. 15 r. 4 does not lend any support to the applicants herein.

Order 15 r. 6

Order 15 r. 6 was cited as an alternative support to the application, and reference was made to:

1. *Arab Malaysian Merchant Bank Bhd v. Dr. Jamaludin Dato' Mohd Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC;
2. *Thomas Alvin Cross v. Thomson Thomas & Ors* [2005] 6 CLJ 61 HC; and
3. *Inai Etike Sdn Bhd v. Mohd Fadzil bin Wadi & Ors* [1995] 4 MLJ 731 HC.

Respective learned counsel for the first defendant, and for the second and third defendants, contended that O. 15 r. 6 was inapplicable.

The importance of O. 15 r. 6 merits reproduction as follows:

> **6 Misjoinder and non-joinder of parties (O. 15 r. 6)**
>
> (1) …
>
> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) …;
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) any person who **ought to have been joined as a party or whose presence before the Court is necessary** to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter; (emphasis added)
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

(3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

Order 15 r. 6 has been judicially considered in *Arab Malaysian Merchant Bank, supra*, where the then Supreme Court established the test to be applied in deciding whether a person is entitled to be added as a party under O. 15 r. 6(2)(b)(ii). Gunn Chit Tuan SCJ (later CJ (M)) in delivering judgment of the court explained that:

1. This rule allows intervention by persons who are not parties;

2. One of the classes of cases covered by the rule is where the proprietary or pecuniary rights of the intervener are indirectly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly, not only in his legal rights but in his pocket in that he will be bound to foot the bill;

3. The court in its discretion may allow such a person to be added as a party on such terms as it thinks fit as it enables all matters in dispute "to be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome: *Gurtner v. Circuit* [1968] 1 All ER 328 CA per Lord Denning MR; and

4. The powers of the court in considering an application under O. 15 r. 6(2)(b) are very wide.

(See also my judgment in *Inai Etike Sdn Bhd, supra*, and the cases cited therein; and *Thomas Alvin Cross, supra,* per Azhar Maah J).

Order 15 r. 6 was also considered by Abdul Malek Ahmad J (now PCA) in *Foo Ban Nyen v. Foo Yet Kai & Sons Sdn Bhd & Ors* [1991] 2 CLJ 1364; [1991] 2 CLJ (Rep) 612 HC, in which the sixth and seventh respondents had applied to be struck out as parties to a petition filed by the petitioner under s. 181 of the Companies Act 1965. As the sixth and seventh respondents were alleged to be relevant parties to the oppression complained of, his Lordship held that they should remain as parties so that all issues affecting the relevant parties could be disposed of at one hearing.

The above judgment was applied by Ramly Ali J in *Kejutan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors* [2005] 2 CLJ 766 HC.

All learned counsel for the respective parties herein have not disputed the above test and the governing principles in relation to the applicability of O. 15 r. 6(2)(b). That, I would have thought, would have brought the instant application to its logical conclusion without further ado, since the factual background has fulfilled the test and governing principles set out by the Supreme Court in *Arab Malaysian Merchant Bank Bhd, supra.*

However, other issues had been ventilated by the defendants' respective learned counsel for my consideration.

Applicants' Capacity As Guarantors

It was submitted for the first defendant that:

1. upon the winding-up of the plaintiffs, the right of action rests with the provisional liquidators, not the directors or guarantors, relying on s. 236(2)(a) of the Companies Act 1965; *Fargro Ltd v. Godfroy and Others* [1986] 3 All ER 279 HC; *Bank of Ethiopia v. National Bank of Egypt and Liguori* [1937] 3 All ER 8 HC; *Kent and Others, Liquidators of LA Banque Ville-Marie v. LA Communayte Des Sceurs De Charite De La Providence And Others* [1930] AC 220 PC; and *Scarel Pty Ltd v. City Loan & Credit Corporation Pty Ltd* [1987] 12 ACLR 730 FC;

2. The applicants who were not parties to the debenture and there was no privity of contract between them and the first defendant so as to give them the locus standi, referring to *Abdul Manaf Mohd bin Ghows v. Nusantara Timur Sdn Bhd & Ors* [1997] 4 CLJ 437 CA; and *Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd* [2000] 7 CLJ 550 HC; and

3. The applicants have already counterclaimed against the first defendant in the other two suits, and making them additional plaintiffs would result in duplicity of actions, citing *Bank of Canton Ltd v. Dart Sum Timber (Pte Ltd* [1978] 2 MLJ 5 CA Singapore; and *Lai Kim Loi v. Dato Lai Fook Kim And Anor* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC.

Substantially similar sentiment was echoed for the second and third defendants, on the basis of *Yip Shou Shan v. Sin Heap Lee – Marubeni Sdn Bhd* [2002] 5 CLJ 574 HC; *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35 CA; *Burgess v. Auger* [1998] 2 BCLC 478 HC; and *Malayan Prestressed Concrete Strand Manufacuring Sdn Bhd (Dalam Penerimaan) & Satu Yang Lain v. Malaysian Ropes Sdn Bhd* [1991] 3 CLJ 2096; [1991] 1 CLJ (Rep) 686 HC.

For the plaintiffs, it was contended that the applicants' case was not to substitute the plaintiffs herein but to be made as additional plaintiffs and that at this stage, the court should not embark on the merits of the applicants' claim against the defendants, seeking support in, *inter alia, Inai Etike Sdn Bhd, supra*.

Upon an anxious consideration of the above submissions, I am of the view that the issue for determination is whether the applicants have fulfilled the conditions under O. 15 r. 6(2)(b)(i) or (ii) in order to enable the court to exercise the discretion so as to order them to be added as parties *viz* as additional plaintiffs in this case.

In this regard, I am of the view that the authorities which consider the law other than O. 15 r. 6(2)(b)(i) or (ii) are unlikely to be of any relevance.

First of all, the submissions presented for the defendants would appear to give the impression that the applicants have intended to replace the existing plaintiffs. As a matter of fact, that is not to be the case, as the terms sought by the applicants are clear and unambiguous *viz.* to be made additional plaintiffs.

In deference to the efforts expended by the respective counsel of the defendants, I shall deal with the authorities upon which they have relied.

Section 236(2)(a) of the Companies Act 1965 provides for the powers of the liquidators to bring or defend any action or other legal proceeding in the name and on behalf of the company *viz* the plaintiffs herein.

The applicants herein are not challenging the powers of the liquidators, but have instead filed this application in their personal capacity as guarantors to the banking facilities. There is nothing in s. 236(2)(a) to preclude them from being made additional plaintiffs.

Fargro Ltd, supra, concerns a minority shareholder's action when the company is in liquidation. Walton J held, *inter alia,* that the appropriate procedure is for the liquidator to bring the action on behalf of the company.

In the *Bank of Ethiopia, supra,* the Bank of Ethiopia had been dissolved and so Clauson J held at p. 12 that no action could be brought in the name of the bank otherwise than by or under the authority of the duly constituted liquidator of the bank.

The Privy Council in *Kent and Others, supra,* held, *inter alia,* that under the Canadian Winding-Up Act 1886, a company in liquidation retains its corporate powers including the power to sue, exercised through the liquidator under the authority of the court.

In *Scarel Pty Ltd, supra,* the Federal Court of Australia held, *inter alia,* that the liquidator is the appropriate person in whom is vested the authority to decide whether the company should take or continue action to recover damages or to secure other relief for an injury done to the company.

In relation to the privity point, it is to be noted that in *Abdul Manaf Mohd, supra,* the sale and purchase agreement was executed by the second and third respondents as directors of Nusantara Timur, and so they could not be personally liable for the balance of the purchase price.

However, the applicants herein have taken the capacity of guarantors in which case they are clearly persons to whom privity of contract would apply.

Double Acres, supra, concerns an application filed by the second defendant therein under O. 18 r. 19 to strike out the counterclaim of Tiarasetia Sdn Bhd. Abdul Malik Ishak J held that a director who acted on behalf of the company was not liable.

The issue of duplicity of action would involve an analysis of *Bank of Canton, supra.* A reasonable reading of the judgment of the Singapore Court of Appeal leads me to the conclusion that there were two suits for which the appellants had applied for consolidation and the appellants were ordered to elect which suit they intend to proceed. In my view, it has no remote relevance to the instant application before me.

In *Lai Kim Loi, supra,* the issue before the then Supreme Court was whether a petition under s. 218 of the Companies Act 1965 could be rolled up with a petition under s. 181 thereof. Speaking for the court, Gunn Chit Tuan SCJ (later CJ (M)) gave the answer in the negative.

I am of the view that the above authorities cited for the first defendant do not lend any support to its contention that the applicants have no right or cause of action, as the applicants have filed this application *qua* guarantor.

The authorities cited for the second and third defendants would now be considered.

In *Yip Shou Shan, supra,* the plaintiff's action was for trespass and does not involve any application of O. 15 r. 6(2)(b)(i) or (ii). Similarly, on appeal in *Sin Heap Lee-Marubeni, supra,* the Court of Appeal was not asked to consider this procedural law.

Burgess, supra, and *Malayan Prestressed Concrete, supra,* were also not concerned with the provisions of O. 15 r. 6(2)(b)(i) or (ii).

In my view, these authorities are also of no assistance to the second and third defendants.

I would go one step further and hold that the authorities cited for all the defendants have gone to the extent of urging me to decide on the merits of the applicants' claim against them, when the application, put in its proper perspective, is merely to make them additional plaintiffs, since they are the guarantors to the banking facilities granted by the first defendant to the plaintiffs. The merits of the plaintiffs' claim would only crystallise after their pleadings have been filed if this application is resolved in their favour.

Conclusion

On the foregoing grounds, I hold that the applicants have established that they are within the ambit of O. 15 r. 6(2)(b)(i) or (ii). Hence, I allow this application in encl. (72) and make an order in terms thereof.